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Planned and possible future work — Part III

Proposal by the Government of the United States of America: future work for Working Group II

Note by the Secretariat

1. In preparation for the forty-seventh session of the Commission, the Government of the United States of America submitted to the Secretariat a proposal in support of future work in the area of international commercial conciliation. The English version of that note was submitted to the Secretariat on 30 May 2014. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

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Annex

As the draft Convention on Transparency in Treaty-Based Investor-State Arbitration[1] will be considered by UNCITRAL at its 47th Session, Working Group II (Arbitration and Conciliation) has completed the transparency-related projects within its mandate. The Commission now needs to decide what future projects, if any, might merit the use of Working Group resources. The United States proposes that the Working Group address the enforceability of settlement agreements resulting from international commercial conciliation.

Background: The United Nations General Assembly has recognized that the use of conciliation "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States."[2] Because promoting the use of conciliation may help achieve these benefits, UNCITRAL has previously developed two important instruments aimed at increasing its usage: the Conciliation Rules (1980) and the Model Law on International Commercial Conciliation (2002). (In this paper, as in the Model Law, the term "conciliation" is used to refer to "a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute."[3] Thus, this paper does not intend to differentiate conciliation from mediation.)

When UNCITRAL completed this earlier work, it was already recognized that "[c]onciliation is being increasingly used in dispute settlement practice in various parts of the world," and that it is "becoming a dispute resolution option preferred and promoted by courts and government agencies," in part because of its high success rate.[4] Since then, conciliation's acceptance and use have continued to grow. For example, in 2008, the European Union issued a directive on mediation, requiring that its member states implement a set of rules designed to encourage the use of mediation in cross-border disputes within the EU.[5] Increased use of conciliation can be expected as parties continue to seek options that reduce costs and provide faster resolutions.

One obstacle to greater use of conciliation, however, is that settlement agreements reached through conciliation may be more difficult to enforce than arbitral awards, if a party that agrees to a settlement later fails to comply. In general, settlement agreements reached through conciliation are already enforceable as contracts between the parties.[6] However, enforcement under contract law may be burdensome

[1] A/CN.9/812 (2014).

[2] A/Res/57/18 (2003).

[3] Model Law on International Commercial Conciliation, art. 1.3.

[4] Guide to Enactment of the Model Law on International Commercial Conciliation ("Guide to Enactment"), para. 8.

[5] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3.

[6] Guide to Enactment, supra note 4, at para. 89.

and time-consuming. Thus, if even a successful conciliation simply results in a second contract that is as difficult to enforce as the underlying contract that gave rise to the dispute, engaging in conciliation to address a contractual dispute may be less attractive. Moreover, unlike arbitration, which generally provides a definitive resolution to a dispute, conciliation does not guarantee that the parties will reach an agreement, and even a party that agrees to a resolution may later fail to comply. Thus, in deciding whether to invest their time and resources in the process of conciliation, parties may want greater certainty that, if they do reach a settlement, enforcement will be effective and not costly. "Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitral award."[7] Thus, the Commission has supported "the general policy that easy and fast enforcement of settlement agreements should be promoted."[8] Bolstering enforceability across borders also helps promote finality in settlement of cross-border disputes, as it reduces the possibility of parties pursuing duplicative litigation in other jurisdictions. For these reasons, initial consultations with the private sector have indicated strong support for further efforts by UNCITRAL to facilitate the enforceability of conciliated settlement agreements.

Proposed Convention: To further these goals, the United States proposes that Working Group II develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation, with the goal of encouraging conciliation in the same way that the New York Convention facilitated the growth of arbitration. Just as the New York Convention has been successful in part due to its relative brevity and simplicity, an analogous convention on conciliation should also avoid unnecessary complexity.

With respect to the scope of a convention, the United States proposes that the Working Group address the following issues, among others:

- Providing that the convention applies to "international" settlement agreements, such as when the parties have their principal places of business in different states;
- Ensuring that the convention applies to settlement agreements resolving "commercial" disputes, not other types of disputes (such as employment law or family law matters);
- Excluding agreements involving consumers from the scope of the convention;
- Providing certainty regarding the form of covered settlement agreements, for example, agreements in writing, signed by the parties and the conciliator; and
- Providing flexibility for each party to the convention to declare to what extent the convention would apply to settlement agreements involving a government.

The convention could then provide that settlement agreements falling within its scope are binding and enforceable (similar to Article III of the New York Convention), subject to certain limited exceptions (similar to Article V of the New York Convention).

[7] Id. para. 87.
[8] Id. para. 88.

Such an approach would build on existing law. To encourage use of conciliation, many legislative frameworks and sets of rules make some conciliated settlement agreements easier to enforce by treating them in the same manner as arbitral awards. For example, the UNCITRAL Model Law on International Commercial Arbitration (adopted in many jurisdictions around the world) provides in Article 30 that if parties settle a dispute during arbitral proceedings, the tribunal can make an award on agreed terms, with the same status and effect as any other award on the merits of a case. The result relies on a legal fiction: although the parties resolve the dispute themselves, rather than waiting for a neutral third-party decision maker to impose a resolution, the settlement is still categorized as an award. This fiction gives the parties the same benefits in terms of finality and ease of enforcement that a normal award would have provided.

Other jurisdictions have gone further by treating conciliated settlement agreements equivalently to arbitral awards even if arbitral proceedings have not yet commenced. These jurisdictions thus provide parties with an incentive to settle disputes at earlier stages. For example, UNCITRAL has noted that India and Bermuda provide for settlement agreements reached through conciliation to be treated as arbitral awards.[9] A number of U.S. states, including California and Texas, have statutes on international commercial conciliation that provide for settlement agreements to have the same legal effect as arbitral awards.[10] Various sets of arbitration rules around the world take a similar approach. The Korean Commercial Arbitration Board's Domestic Arbitration Rules provide that, if conciliation succeeds in settling a dispute before arbitration commences, "the conciliator shall be deemed to be the arbitrator appointed under the agreement of the parties, and the result of the conciliation shall ... have the same effect" as an award on agreed terms.[11] The Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce similarly provide that the parties can appoint the mediator as an arbitrator for the purpose of confirming a settlement agreement as an arbitral award.[12]

A convention for conciliation modelled on the New York Convention would draw upon the approach taken by these jurisdictions, but would address the enforceability of settlement agreements directly, rather than relying on the legal fiction of deeming them to be arbitral awards. This approach would also eliminate the need to initiate an arbitration process (with the attendant time and costs) simply to incorporate a settlement agreement into an award.

Any convention along these lines would, of course, need to include a limited set of exceptions similar, but not identical, to those provided in Article V of the New York Convention. For example, an analog to Article V(1)(d) (regarding the composition of the arbitral authority or the arbitral procedure) may not be necessary. By contrast, the Working Group could consider whether to allow a party to a settlement agreement to prevent enforcement if it can demonstrate that it was coerced into signing that settlement agreement.

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[9] Id. para. 91 (citing Bermuda, Arbitration Act 1986; and India, Arbitration and Conciliation Ordinance, 1996, arts. 73-74).

[10] E.g., Cal. Civ. Pro. § 1297.401; Tex. Civ. Prac. & Rem. Code Ann. § 172.211.

[11] Korean Commercial Arbitration Board, Domestic Arbitration Rules 18.3 (2011).

[12] Arbitration Institute of the Stockholm Chamber of Commerce, Mediation Rules 14 (2014).

The Working Group could also consider several possible structural limitations on enforcement under the convention:

- Whether to provide that other courts could give effect to an originating jurisdiction's determination that a settlement agreement is not enforceable (similar to the New York Convention's treatment of set-aside proceedings);
- How to avoid duplicative litigation caused by simultaneous attempts to enforce a settlement under the convention as well as under contract (or other) law; and
- How to ensure respect for restrictions on enforcement chosen by the parties to a settlement (e.g., settlements containing forum selection clauses or other limitations on remedies).

Moreover, settlement agreements can contain long-term obligations regarding the parties' conduct years into the future, and might address such issues more commonly than arbitral awards would. The Working Group should consider whether limits on enforcement under the convention would be appropriate in such cases. For example, enforcement under the convention could be made available only for a limited period of time, after which other mechanisms — such as domestic contract law — might be more appropriate (e.g., to deal with issues such as changed circumstances). Other methods of limiting the convention's application to non-monetary elements of settlements could also be considered.

During the development of the Model Law on International Commercial Conciliation, it was noted that drafting uniform legislation regarding enforcement would be difficult because the methods for achieving expedited enforcement of settlement agreements varied greatly between legal systems and depended on domestic procedural law.[13] However, the Working Group could minimize these difficulties by addressing enforcement via a convention that, like the New York Convention, sets forth the result that states would need to provide through their domestic legal systems (in this case, enforcement of conciliated settlement agreements) without trying to harmonize the specific procedure for reaching that goal.[14]

Similarly, efforts to develop a convention should not seek to develop harmonized rules for the conciliation process itself, just as the New York Convention does not set forth mandatory rules for conducting arbitral proceedings. However, the Working Group could consider whether additional topics, such as the confidential nature of conciliation discussions, could be addressed through further projects after completion of an initial convention.

Next Steps: In view of the potential benefits of such a convention, as well as the background work already done by the Secretariat in the context of the development of the Model Law, the United States urges the Commission to assign this project the highest priority within the Working Group, including at its next session in September 2014. While other efforts under consideration by the Working Group (such as updating the Notes on Organizing Arbitral Proceedings) should continue, they should not delay work on this project.

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[13] Guide to Enactment, supra note 4, at para. 88.

[14] Similarly, although this convention would provide for enforcement of settlement agreements, it would not address matters related to the attachment or execution of assets, just as the New York Convention did not do so.

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Planned and possible future work — Part IV

Proposal by the Government of Canada: possible future work on electronic commerce — legal issues affecting cloud computing

Note by the Secretariat

1. In preparation for the forty-seventh session of the Commission, the Government of the Canada submitted to the Secretariat a proposal in support of future work in the area of cloud computing. The English and French versions of that note were submitted to the Secretariat on 19 June 2014. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

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Annex

I. Introduction

1. Pursuant to the mandate from the 44th Commission Session in 2011, Working Group IV on Electronic Commerce (Working Group) has carried out its work on electronic transferable records, including certain aspects of other topics identified as warranting the attention of UNCITRAL, such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.[1] For the 47th Commission Session, the Working Group will report on the work of its 48th and 49th Sessions. The work on model provisions for electronic transferable records is progressing. As such, it may be time for the Commission to consider future work in the field of electronic commerce.

II. Cloud computing and related legal issues in cross-border context

2. In recent years cloud computing has progressed rapidly and is now widely used in many sectors of business activities as well as by public sector bodies. Cloud computing can generically be defined as computing services (e.g., data hosting or data processing) over the Internet. It requires a form of restricted access which is granted to a defined group of individuals, such as the employees of a business. What is often difficult for the layman to conceptualize is that it involves a variety of configurations of computer hardware (or group of computing hardware) called servers. Individual users, once they have been granted access, can use the servers' processing power to run an application, store data, or perform any other computing task. It is described as "cloud" because the computing is not done on one's personal computer or on the business' own computer system, but elsewhere through an Internet connection. In effect, cloud computing limits the need for in-house computer networks, servers and even personal computers because instead of using these devices or in-house networks to perform computing functions, the applications and computing capacities of the service provider are used. Using cloud computing can greatly facilitate the conduct of business by reducing costs and increasing mobility of users.

3. Despite the advantages of cloud computing, businesses may be reluctant to use it because of issues of reliability, security of confidential information such as trade secrets, the absence of physical presence of the service provider in the jurisdiction, standard contract clauses perceived to be too slanted in favour of the cloud provider, the rigidity of the models proposed by service providers that are unable to satisfy legal requirements of the client, and many other reasons.

[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238- 239.

III. Why would work on identifying legal issues associated with cloud computing be useful

4. Given the importance of cloud computing in today's business world and its increasing use both domestically and in a cross-border context, it would be useful for UNCITRAL to carry out work on the legal issues affecting parties to a cloud computing arrangement. Outlining the legal risks associated with entering into contractual cloud computing agreements would be useful to private parties for the protection of their interests and in the assessment of how they carry on business. The consideration of cross-border cloud computing services by UNCITRAL would also contribute to the development of international trade by reducing or removing obstacles in international trade and by identifying opportunities for harmonization of practices and laws.

5. Cloud computing raises a number of contractual as well as other legal issues. Although intellectual property rights on software and privacy issues, including the determination of the applicable privacy law, have been identified and potentially create significant challenges in practice, the current proposal excludes intellectual property and privacy from the scope of the work proposed and is restricted to contractual issues affecting hosts, clients and users of cloud computing and related jurisdictional issues. It is limited to the preparation of a document outlining the cloud computing contractual relationships and legal issues that arise in that context. Without prescribing the form of such a document, it could be a checklist or a more detailed list of considerations for cloud users similar to other UNCITRAL documents in other fields, such as the *Notes on Organizing Arbitral Proceedings (1996)*, *Recognizing and Preventing Commercial Fraud: Indicators of Commercial Fraud (2013)*, or the *Legal Guide on International Countertrade Transactions (1992)*. The following paragraphs contain a list of issues that could be considered. The list is intended to be an illustration of the contractual aspects that could be considered and is non-exhaustive.

6. First, what are the duties and responsibilities of each participant to cloud agreements? Security standards of cloud providers are not regulated, depend on assertions that are difficult to verify for most clients and are supported by contracts that may be difficult to enforce in practice because of servers located in unknown places and interlinked with unknown servers. This raises issues about the compliance obligations to domestic laws, which in some cases might conflict. Can the duties and responsibilities be enforced and allocated in a cross-border context? What duties does the service provider have towards preserving the integrity of the data? What remedies are available in cases where the integrity of the data has been compromised? Can guidance be provided to service providers and applicants for the assessment and negotiation of contractual obligations? For example, what duties does the service provider have in relation to business losses due to the unavailability of the service? Under what terms can a cloud agreement be terminated? What happens to the data when the contract is terminated?

7. Second, secured access to cloud data hosting servers requires that adequate identity management protocols be established. It seems largely accepted that any identity management system is based to a large extent on a contractual framework. The contractual framework allocates obligations, risks and liabilities. However, is any contractual framework acceptable or should best practices be established? In

addition, how does States' domestic legislation apply to accepted identity management protocols? What do courts accept as reasonable practices and what do they consider being negligent practices?

8. Third, data hosting is governed by a contractual agreement between the service provider and the person, the applicant, wishing to make cloud data hosting available to a specific group of individuals (typically employees or clients). These contracts often contain standard terms from the service providers but may also be negotiated between the parties. Who owns the data under these agreements? Users, although not typically party to the contractual agreements, may see their rights and obligations affected by using cloud computing (i.e., where personal information is entered and stored, where users negligently give access to data to unauthorized third parties). How are third parties and third parties-related information affected by cloud computing agreements?

9. Fourth, the cloud service agreement can raise issues of conflict of laws. These conflicts can take place in relation to the various aspects of the contracts, which for different reasons are not subject to the same law. (For example, in some situations users are not party to the service agreements and are therefore not affected by a choice of law clause in the service agreement. In other situations, by application of public policy in various States, including consumer protection, privacy legislation and protection of confidential information legislation, different laws come into play.) These issues are likely to become increasingly prevalent, as well as more complex, in light of the fact that many cloud providers use multi-jurisdictional locations for their servers and operations.

10. Similarly, the interaction between choice of jurisdiction and jurisdictional rules on the one hand and public policy and connecting factors used to determine jurisdiction of a court on the other hand could lead to important challenges in practice. For example, would a choice of applicable law and jurisdiction between the service provider and the service applicant pointing to State A validly oust jurisdiction of the national courts in State B where a user is located? More generally, should the host be subject to disclosure requirements even though it has very limited connection to the jurisdiction ordering disclosure?

11. Fifth, what practical and effective measures to limit risks should be put in place by service providers? For example should service providers be encouraged to offer multi-tiered access with varying access privileges (i.e., not all personal information about an entity is accessible to all users)? Should they be required to inform potential clients of the availability or unavailability of such safeguards and multi-tiered access functions? Should they contract liability insurance and who should be responsible for insuring a particular risk? Is the cloud computing and related legal issues different in the government context versus in the business context and should different standards apply? Should the service provider be required to disclose that access to the data can be granted to a given State authority in the conduct of special investigative powers? Is the existence of legislation on the protection of personal information and compliance by the service provider with the legislation sufficient to exonerate the provider from liability?

IV. Work to be carried out by UNCITRAL

12. The Commission could request the Secretariat to gather information relating to cloud computing, and in particular to data hosting, software as a service (SaS), and other prevalent cloud computing solutions, and prepare a document outlining existing practices. Where appropriate the document could stress potential risks stemming from current practices in relation to conflict of laws, the lack of supporting legislative provisions in national laws giving effect to data hosting-related agreements, and the lack of harmonization of domestic laws. The work could be done in collaboration with The Hague Conference on Private International Law where issues of conflicts of laws are being considered. The document could outline where best practices are needed based on evidence of absence of legal recourses, perceived imbalance between the rights and obligations of cloud computing participants or other evidence. Finally, the document could point to work done by other organizations in relation to cloud computing, notably in relation to privacy and the protection of personal information, with the view of identifying gaps in the international trade law framework. The document could then be used by the Working Group to identify issues in need of practical legislative or other solutions and to discuss possible future work.